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FEDERAL COMMUNICATIONS COMMISSION

October 6, 1994

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

Re: PR Docket No. 94-105

Dear Mr. Caton:

Please find enclosed for filing an original plus eleven copies of the COMMENTS OF CALIFORNIA IN SUPPORT OF PROTECTIVE ORDER in the above-referenced docket.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed, postage pre-paid envelope.

Very truly yours,

Ellen S. LeVine
Principal Counsel

ESL:tio

Enclosures

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

FCC FILE NO.

In the Matter of)
Petition of the People of the)
State of California and the)
Public Utilities Commission)
of the State of California)
to Retain Regulatory Authority)
over Intrastate Cellular Service)
Rates)
_____)

PR Docket No. 94-105

COMMENTS OF CALIFORNIA IN SUPPORT OF PROTECTIVE ORDER

The People of the State of California and the Public Utilities Commission of the State of California ("CPUC" or "California") hereby submit their comments on the proposed protective order prepared by the Private Radio Bureau of the Federal Communications Commission ("FCC") in the above-referenced docket. At an ex parte meeting scheduled by the Private Radio Bureau and held September 30, 1994, the Private Radio Bureau invited those in attendance to submit comments on a proposed protective order by October 7, 1994. As discussed at the meeting, the FCC indicated that it may adopt a protective order to allow parties to this proceeding access to information provided to the FCC by the CPUC under seal.

In this proceeding, the following material is potentially subject to a protective order if the FCC concludes that such information falls within Exemption 4 of the Freedom of Information Act ("FOIA"), 47 C.F.R. Section 0.459:
(1) information obtained by the CPUC in the course of its own formal investigation of the wireless industry and provided to the

FCC by the CPUC under seal;¹ (2) information provided to the CPUC by the California State Attorney General and provided to the FCC by the CPUC under seal; (3) carrier-specific minutes-of-use data which the CPUC obtained from cellular carriers subsequent to filing its petition; and (4) carrier-specific subscriber data which was relied upon by the Cellular Telecommunications Industry ("CTIA") in its opposition to the CPUC petition.

All of the information contained in items (1) through (3) is relevant, material and essential to the CPUC petition. The information contained in item (4) is apparently considered relevant and material by CITA in its effort to defeat the CPUC petition, and thus, as a matter of law, must be disclosed to the CPUC in order to allow the CPUC to rebut claims made in reliance on such information.

Accordingly, as discussed below, the CPUC strongly supports the issuance of a protective order in this proceeding. Such protective order should comprehensively include all materials provided by any party which falls within Exemption 4 of FOIA.

**I. THE FCC SHOULD ISSUE A PROTECTIVE ORDER
GOVERNING ALL INFORMATION REVIEWED OR RELIED
UPON BY ANY PARTY TO THIS PROCEEDING WHICH IS
DEEMED COMMERCIALY SENSITIVE BY THE FCC**

The issuance of a protective order in this proceeding governing all relevant and material information reviewed or relied upon by any party to this proceeding and which the FCC

1. Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications, I. 93-12-007.

deems commercially sensitive is necessary, appropriate and in the public interest. Such an order properly balances the interests of the cellular carriers in guarding against the full public disclosure of commercially sensitive material while protecting the right of the CPUC to present its case and the right of other parties to be heard.

Nevertheless, the cellular carriers made clear at the FCC's ex parte meeting of September 30 that they will oppose the issuance of any protective order regardless of the terms and conditions of such order. The FCC must reject their arguments.

A. The Cellular Carriers Offer No Rational Or Lawful Basis For Refusing To Disclose Under A Protective Order Information Submitted By The CPUC Under Seal

Inexplicably, the cellular carriers have thus far failed to acknowledge in written pleadings to the FCC that all of the information they provided to the CPUC under seal in the CPUC's formal investigation of the wireless industry and which comprises most of the information submitted by the CPUC to the FCC under seal, is subject to disclosure to any party to the CPUC proceeding under a protective order.² Their attempt to create

2. Without exception the three ALJ rulings in I. 93-12-007 provide that all parties may obtain confidential copies of unredacted data, studies and other information under the terms and conditions of non-disclosure arrangements. See, e.g., ALJ Ruling of September 14 at 6-7 ("CCAC will not be compelled to publicly disclose the confidential portions of its study. Parties may still obtain confidential copies of the unredacted

(Footnote continues on next page)

the false impression, by selectively citing CPUC administrative law judge rulings, that this information has remained strictly confidential or otherwise absolutely barred from disclosure under any terms and conditions must be rejected.

Second, none of the cellular carriers have ever challenged the CPUC administrative law judge rulings allowing for protected disclosure of all of the information submitted to the CPUC. Likewise, none of the cellular carriers have ever challenged the relevancy or materiality of the information they provided.

Third, to the CPUC's knowledge, none of the cellular carriers has ever refused to provide upon request to any party to the CPUC proceeding, including a cellular competitor, the information submitted to the CPUC. To the contrary, to the CPUC's knowledge, the cellular carriers have complied with all

(Footnote continued from previous page)

study from CCAC for review, but must do so under a nondisclosure agreement. This procedure was previously described in the ALJ ruling of August 8, 1994, Ordering Paragraph 6.")

Ordering Paragraph 6 of the ALJ Ruling of August 8 specifically states that "Any party, other than CRA [which had already been given access to information in the ALJ Ruling of July 19] interested in obtaining a copy of the unredacted confidential version of the data responses provided by the carriers in this proceeding shall do so by contacting the respective carriers and executing a nondisclosure agreement as prescribed in the July 19 ruling."

The three ALJ rulings are appended to the Opp. of California to Motion to Reject Petition or Alternatively, Reject Redacted Information.

requests for information under the terms and conditions of nondisclosure agreements.

In short, the strenuous efforts by these same cellular carriers to resist disclosure in this proceeding of the very same information under similar protective arrangements they did not challenge in the CPUC proceeding are simply irrational.

B. Other Than Their Meritless Belief That the CPUC Violated State Law In Submitting Under Seal To The FCC Information Obtained By The CPUC From the State Attorney General, There Is No Basis For Excluding Such Information From A Protective Order

The CPUC complied with all applicable law in submitting to the FCC under seal information obtained by the CPUC from the California State Attorney General, as well as information obtained from cellular carriers in the CPUC proceeding. Claims to the contrary are simply baseless, as fully explained at 10-14 of the Opposition of California to Motion to Reject Petition Or, Alternatively, Reject Redacted Information (filed September 27).

In brief, the CPUC has not publicly disclosed any information provided to it under seal. And disclosure under seal of information provided to the FCC does not constitute "public disclosure."³ Accordingly, state law that governs public disclosure of information is simply not relevant to the facts of

3. To be sure, it cannot seriously be argued that the cellular carriers have suffered commercial harm because the FCC reviewed the information provided by the CPUC.

this case.⁴

The cellular carrier nevertheless suggest that the CPUC has a "duty" to ensure against disclosure, apparently under any set of conditions, of the sealed information it submitted to the FCC.⁵ At the same time, in other pleadings they have argued that the CPUC cannot rely on information submitted under seal. The carriers' absurd logic would thus compel the CPUC to exclude the very information which is essential to its petition.⁶ To be sure, the only duty of the CPUC is to uphold the public interest and protect California consumers from paying unjust and

4. Section 583 of the Public Utilities Code provides in pertinent part:

"No information furnished to the commission by a public utility ...shall be open to public inspection or made public except on order of the commission Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor."

The CPUC has never held open for "public inspection" or "made public" any of the information which it submitted under seal in its petition to the FCC. It is therefully complied fully with Section 583. In any event, the FCC is not charged with enforcing state law.

5. But see Opp. of GTE Service Corporation to Request for Access of Nat'l. Resellers at 4 (By submitting its petition in redacted form, "the CPUC took steps necessary to ensure the information is kept confidential.")

6. While the CPUC has no independent interest in maintaining the confidentiality of information it submitted under seal, the CPUC has a very strong interest in ensuring that such information becomes part of the record upon which the FCC relies in considering the CPUC petition. Inasmuch as most of this information was provided at the suggestion of the FCC itself, it would be grossly unfair to exclude such information and then deny the CPUC's petition.

unreasonable rates for cellular service. The CPUC petition is submitted in fulfillment of that responsibility.

Finally, contrary to their assertions, the cellular carriers have every opportunity (which they have certainly taken) to argue before the FCC against public disclosure of this information or any other information. Their rights have been fully preserved.

C. The Cellular Carriers Must Disclose Similar Types Of Information Which They Reviewed Or Relied Upon In Opposing the CPUC Petition

The cellular carriers offer no lawful basis for refusing to disclose under protective order similar types of carrier-specific subscriber information that they themselves reviewed or relied upon in their opposition to the CPUC petition, but that they consider "commercially sensitive." See CPUC Emergency Motion To Compel Production (filed September 30). At the same time, apparently oblivious to the CPUC's due process rights, they complain that their own due process rights are violated if they cannot review the information submitted by the CPUC under seal.⁷ They cannot have it both ways. The cellular carriers should be ordered to disclose all information set forth in the CPUC data requests of September 26, 1994, and if necessary, pursuant to a protective order. Absent such disclosure, they

7. Of course, in the case of the cellular carriers, not one has requested to review the information contained in the CPUC petition. In contrast, the CPUC has expeditiously and vigorously sought access to the information contained in CTIA's opposition. To date, CTIA has resisted the CPUC's request.

should be ordered to withdraw any affidavits and text within their oppositions that rely on such information.

D. The Information Provided By the CPUC Is Necessary, Relevant and Material To This Proceeding

Contrary to the cellular carriers' claims, all of the information contained in the CPUC petition is material, relevant and necessary to support the CPUC's findings that market conditions in California cellular markets are not yet adequate to ensure just and reasonable rates for cellular services provided to California consumers. Indeed, much of the information which the cellular carriers resist disclosing under any conditions is "considered pertinent to determine market conditions and consumer protection by the Commission in reviewing any petition filed by a state under this section." Second Report and Order, Section 20.13 (2), Appendix A at 6.

Specifically, the FCC identified as pertinent:

"(ii) The number of customers of each commercial mobile radio service provider in the state, and the period of time that these providers have offered service in the state. (Emphasis added).

(iii) rate information for each commercial mobile radio service provider in the state; trends in each provider's customer base during the most recent annual period or other data covering another reasonable period if annual data is unavailable." (Emphasis added).

Id.

Accordingly, at the FCC's suggestion the CPUC provided this information. The CPUC also explained fully in its petition why

it reviewed and relied upon market share and capacity utilization data. See CPUC Petition at 29-34 (carrier-specific market share data by itself and the use of such data for developing market concentration ratios are evidence of market power); CPUC Petition at 51-54 (carrier-specific capacity utilization rates provide evidence of ability of individual carriers to inflate artificially the price for cellular services in duopoly markets).

Not surprisingly, CTIA reviewed and relied upon the very same type of carrier-specific subscriber information in its opposition to the CPUC petition. See CPUC Emergency Motion To Compel Production at 2 (CTIA's witness relied on the number of customers per carrier in order to assert that state regulation leads to lower levels of market penetration by cellular carriers.) The cellular carriers' themselves thus fully appreciate the relevancy and materiality of such information.

Several cellular carriers nevertheless argue that state-wide aggregated data that they provided is "sufficient to enable the Commission to make findings on the crucial issues" in this proceeding. CCAC Opp. to Request of Nat'l. Resellers at 8. This argument must be rejected.⁸ Statewide data aggregated for all cellular carriers operating in all markets in California says nothing about whether particular markets are in fact competitive. To the contrary, each market in which the duopoly carriers

⁸. Similarly, the FCC should summarily reject arguments by the cellular carriers that they have somehow discredited the CPUC's findings, based on factual evidence, regarding capacity utilization.

operate in California is discrete and severable. The competitive conditions within each are unique to that market, and have no relevance to competitive conditions in other markets. Accordingly, in order to determine whether competitive conditions are adequate to ensure just and reasonable rates for cellular service, the CPUC must analyze such conditions within each market.

In sum, the carrier-specific information relied upon by the CPUC is "demonstrative evidence that market conditions in the state for [cellular services] do not adequately protect subscribers to such services from unjust and unreasonable rates..." Second Report and Order, Section 20.13 (a)(1), Appendix A at 6. There is no lawful basis to exclude such information from this record.⁹

II. THE FCC SHOULD EXPAND THE SCOPE OF THE PROTECTIVE ORDER TO INCLUDE COMPREHENSIVELY ALL INFORMATION REVIEWED OR RELIED UPON BY ANY PARTY TO THIS PROCEEDING IN SUPPORT OF ITS SUBMISSIONS WHICH IS DEEMED COMMERCIALY SENSITIVE

The proposed protective order upon which the FCC seeks comment identifies only such information which the CPUC provided under seal in its petition to the FCC. The scope of the protective order should be broadened to include any and all information deemed commercially sensitive by the FCC which was

9. As the CPUC said in its opposition to CCAC, it is the FCC's failure to consider evidence essential to the CPUC's petition which would render an FCC order denying the CPUC petition arbitrary and capricious. CPUC Opp. to CCAC Motion to Reject Petition at 7.

reviewed or relied upon, or which may be reviewed or relied upon, by any party in support of its submissions in this proceeding.

In particular, as indicated at the ex parte meeting of September 30, 1994, the CPUC plans to rely upon minutes-of-use data specific to pricing plans of each cellular carrier in the CPUC reply comments. Such data was provided by the cellular carriers to the CPUC under seal subsequent to the filing of the CPUC petition. Should the FCC deem this information commercially sensitive, then such information should be subject to the FCC's protective order.

In addition, as set forth in its Emergency Motion to Compel Production, the CPUC has sought information reviewed or relied upon by CTIA in its opposition to the CPUC petition which CTIA deems proprietary. Such information should likewise be subject to the FCC protective order in this proceeding.

CONCLUSION

In sum, the cellular carriers should not be allowed to defeat the CPUC petition by shrinking and skewing the record to achieve their desired outcome. Where, as here, the information they seek to exclude is relevant and material to the CPUC's showing in its petition and is a "necessary link in a chain of evidence that will resolve a public interest issue," the public interest demands that such information be made part of the record under terms and conditions established by the FCC. Classical Radio for Connecticut, Inc., 69 FCC 2d 1517, 1520 n.4 (1978).

In fashioning a protective order to guard against full public disclosure of information deemed commercially sensitive by

the FCC, the FCC should include all information of such nature reviewed or relied upon by any party in this proceeding.

Respectfully submitted,

PETER ARTH, JR.
EDWARD W. O'NEIL
ELLEN S. LEVINE

BY:


Ellen S. Levine

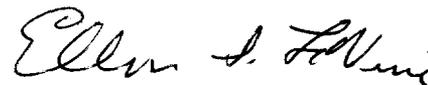
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October 6, 1994

CERTIFICATE OF SERVICE

I, Ellen S. LeVine, hereby certify that on this 6th day of October, 1994 a true and correct copy of the foregoing COMMENTS OF CALIFORNIA IN SUPPORT OF PROTECTIVE ORDER was mailed first class, postage prepaid to those parties appearing on the attached service list.



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